N THE MATTER OF:

Ruth S. Shaughnessy (Widow of John Shaughnessy) Claimant

Against * OWCP No: 1-145340

Case No: 1999-LHC-1638

* .

Bath Iron Works Corporation Employer/Self-Insurer

and

Commercial Union Companies
Liberty Mutual Insurance Company
Carrier

Director, Office of Workers'
Compensation Programs
U.S. Department of Labor
Party-in-Interest

APPEARANCES:

Jeffrey L. Cohen, Esq. G. William Higbee, Esq. For the Claimant

and

Stephen Hessert, Esq. For the Employer

Jean Shea Budrow, Esq.
For the Employer and Liberty Mutual

Richard F. van Antwerp, Esq.
For the Employer and Commercial Union

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: DAVID W. DI NARDI

Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, et seq.), herein referred to as the "Act." The hearing was held on September 22, 1999 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, LX for an exhibit offered by Liberty Mutual, CUX for an exhibit by Commercial Union and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit N	o. Item	Filing Date
CX 19A	Attorney Higbee's letter filing the	10/26/99
CX 20	October 19, 1999 report of Douglas A. Pohl, M.D., Ph.D.,	10/26/99

The record was closed on October 26, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

- 1. The Act applies to this proceeding.
- 2. Decedent and the Employer were in an employee-employer relationship at the relevant times.
 - 3. On August 12, 1998, Decedent passed away.
- 4. Claimant gave the Employer notice of the alleged injury in a timely fashion.
- 5. Claimant filed a timely claim for compensation on or about October 5, 1998 and the Employer filed a timely notice of controversion on or about November 6, 1998.
- 6. The parties attended an informal conference on December 9, 1998.
- 7. The applicable average weekly wage is \$422.85, the National Average Weekly Wage as of the date of death.
 - 8. The Employer has paid no benefits herein.

9. Commercial Union Companies provided coverage under the Act for the Employer from January 1, 1963 through February 28, 1981. Birmingham Fire Insurance Company provided such coverage from September 1, 1986 through August 31, 1988. Liberty Mutual Insurance Company provided such coverage from March 1, 1981 through August 31, 1986. The Employer has been a self-insurer under the Act from September 1, 1988 through the present and continuing.

The unresolved issues in this proceeding are:

- 1. Whether Decedent's lung cancer constitutes a work-related injury.
- 2. Claimant's entitlement to Death Benefits, funeral expenses and interest on past due benefits.
 - 3. Responsible Carrier.
 - 4. The applicability of Section 8(f) of the Act.

Summary of the Evidence

John Shaughnessy ("Decedent" herein), who was born on June 2, 1919, had an eleventh grade formal education and an employment history of manual labor, began working on June 24, 1940 as a carpenter/joiner at the Bath, Maine shipyard of the Bath Iron Works corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Kennebec River where the Employer builds, repairs and overhauls submarines. He left the shipyard on October 2, 1943 and enlisted in the U.S. Navy, returning to the shipyard on December 24, 1945 again as a carpenter/joiner. He was laid-off on May 24, 1946 due to "lack of work" and was recalled to return to work on December 20, 1946 in the same job classification. He was laid-off again on April 8, 1948, returning to the shipyard on June 14, 1948. He voluntarily left the shipyard on June 21, 1998 for personal reasons. He returned to the shipyard on August 27, 1951 as an unskilled laborer, became a tinsmith on September 24, 1951 and was transferred to Department 25 on October 29, 1951 as a first class carpenter/joiner. He then became a so-called working lead man on May 26, 1957 in the same department, continuing in that job classification until January 1, 1962, at which time he became an assistant foreman. He was transferred to Department 10 on July 3, 1974 and became an assistant general superintendent on January 10, 1977, assistant to the Vice President of Production on September 5, 1977 and assistant to the Vice President of Operations on February 24, 1981. He took an "early retirement" on April 30, 1984. (CX 8, CX 12) Decedent did not work thereafter. (TR 31-36)

Decedent smoked one pack of cigarettes every two days or so and he stopped in the middle 1960's when their son John asked his father to give up smoking for his health, and he ceased that habit "cold turkey." Dr. Joseph M. Mendes, in Lisbon Falls, was her

husband's family physician at least since their marriage on October 1, 1938. (CX 5)

Decedent began to experience breathing problems in December of 1997 and he had difficulty shoveling snow because of his "wheeze." Dr. Mendes took chest x-rays in May of 1998 and there have been suits filed against the manufacturers and distributors of asbestos, there have been "minimal" settlements and Claimant did not know the amounts thereof. According to Claimant, her husband was not exposed to asbestos during any of his other employment, and he was not exposed to asbestos while he served as a carpenter's mate in the U.S. Navy. As a lead man at the shipyard, Decedent "was in charge of" the carpenters and "he was all over the boat and down on the waterfront." (CX 22)

Decedent was examined by Dr. Mendes on May 27, 1998 and the doctor's impression was a suspicion of metastatic lung disease and the doctor ordered a CT chest scan for further evaluation of that suspicious mass. (CX 15)

Dr. Jeffrey L. Myers, of the Mayo Clinic, stated in his June 17, 1998 letter to Decedent's doctor (CX 16), that "we concur with your diagnosis of bronchioalveolar carcinoma, mucinous type." Dr. Steven H. Stein, as of July 20, 1998, also concurred in that diagnosis. (CX 17)

Decedent was referred to a pulmonary specialist for further evaluation and Dr. Paul La Prad, in his July 13, 1998 report, states as follows (CX 17):

Airway dynamics reveals forced lateral capacity of 2.10 liters and an FEV1 of 1.50 liters producing an FEV1 to FEC ration of 71%. This is indicative of moderate obstructive airway disease.

Furthermore, severe small airway dysfunction is present and FEF 25-75% is reduced to 35% of predicted.

An insignificant improvement in airway dynamics is noted after inhalation of a bronchodilator as the FEV1 improves to 1.66 liters.

The flow volume loop is complete and reveals a concavity within the effort independent portion of tracing indicative of obstructive airway disease.

An MVV based upon the patient's measured FEV1 is well-maintained, indicative of good patient effort and intact thoracic neuromuscular function.

Static lung volume, as measured by helium dilution, reveal a mild decline in the total lung capacity to 78%

of predicted. This is primarily a total lung capacity to 78% of predicted.

Diffusion capacity based upon an assumed hemoglobin of 14.6 is severely diminished to 37% of predicted.

IMPRESSION:

- 1. Moderate obstructive airway disease, without a significant bronchoreactive component.
- 2. Minimal restrictive lung disease as manifested only by a mild decline in the total lung capacity.
- 3. Severe diffusion impairment. This abnormality may be secondary to anemia or intrinsic carbon monoxide, as the patient does smoke tobacco. Other considerations may include any of the many forms of interstitial lung disease or primary pulmonary vascular disease. Clinical and radiographic correlation is suggested.

Decedent was also examined by Dr. Thomas J. Keating, of the Maine Center for Cancer Medicine and Blood Disorders, and the doctor concluded as follows in his June 30, 1998 report (CX 18 at 110-112):

IMPRESSION: Bronchoalveolar carcinoma of the lung, with numerous bilateral pulmonary nodules.

Mr. Shaughnessy and family members and I discussed the status of his disease, which is quite widespread throughout his lungs. I did tell them that this fairly rare type of lung cancer can be quite indolent in it's (sic) growth kinetics, but usually is very unresponsive to chemotherapy. Surgery or radiation therapy would not be appropriate given the multiple scattered lesions. therefore, suggest that at the present time treatment should be directed toward palliation of the symptoms that he has from the disease, which are fairly mild at the present time. I did tell him that various interventions were available to help with discomfort in the future, such as oxygen therapy, bronchodialtors via pump or nebulizer, cough suppressants. Although chemotherapy could be considered at any point in the process, presently it is more likely to make him feel worse rather than better.

Of note is that his inguinal hernia could potentially cause a problem at some point in the future, and depending on the stability of his respiratory status and underlying malignancy, it might be reasonable to consider herniorrhaphy.

Mr. Shaughnessy and I agreed that it would be helpful to have follow-up through this office, and he will therefore make a return visit in three weeks. He will bring chest x-ray and CT scans at that time for us to review together, according to the doctor.

Additional tests were performed and the doctors then concentrated on an appropriate treatment regimen for Decedent. (CX 18 at 114, CX 17)

The parties deposed William A. Lowell, II, on January 22, 1999 (CX 10) and Mr. Lowell, who worked at the Employer's shipyard from mid-September of 1962 until he retired in May of 1995, testified that he has worked as a leading man, a first line supervisor, and then moved "into the operating and test crew for the machinery plant and machinery spaces." He then "continued work as a leading 1964 when (he) became Assistant Chief Operating On June 1, 1968 he "took over as Chief Operating man until Engineer." Engineer at Bath Iron Works; and (he) worked there in that capacity until the 1st of September, 1989, at which time (he) became General Manager of the (Employer's) Portland shipyard. Subsequently qot promoted to Vice President, continued to manage the Portland shipyard until (he) retired on the 31st of May, 1995." (CX 10 at 3-5)

According to Mr. Lowell, he is familiar with all of the trades at the shipyard as "one of (his) roles was to try to pull all of the construction activities together." Asbestos was the primary pipe covering material used at the shipyard in the 1950s, 1960s and into part of the early 1970s because "the ship construction specifications which were prepared by the U.S. Navy mandated that asbestos go on hot systems." When the hazards of asbestos became known and when there was a substitute material suitable to cover and insulate the piping system, the Employer began to use such substitute material, Mr. Lowell remarking, "And by early 1974 we considered ourselves an asbestos free shipyard." Moreover, by late 1975, "the Navy put out a regulation which prohibited the installation of asbestos pipe covering" because at that time "there were alternate materials" available. (CX 10 at 5-8)

Mr. Lowell met the Decedent in 1962 when he (Mr. Lowell) began to work at the shipyard, at which time Decedent was "a new assistant foreman of that Department" 25-the carpenter's department.

Mr. Lowell estimated that between 1962 and 1968, Decedent would have "spent one-third of his time aboard ship or perhaps even higher at times," "could have been supervising crews that were working in areas where asbestos was being installed," that Decedent would have been exposed to asbestos in the course of this supervising duties, that asbestos dust and fibers would be flying around the ambient air of the work environment, especially after a

sheet of asbestos was cut "with a rip saw," thereby generating "a heck of a mass." Decedent did not wear a respirator while working at the shipyard "and the chances of (Decedent) being exposed (to asbestos) after '74 would be slim," and Mr. Lowell concluded that "the chances (of such exposure) would be non-existent. . . in the late seventies." (CX 10 at 10-13)

Most of Decedent's work from the late 1970s was spent dealing with labor relations and human resource issues. (CX 10 at 17) While asbestos may have been present at the shipyard until the late 1980s, during the overhaul of a vessel, the so-called "rip-outs" of old asbestos to be replaced by fiberglass material took place under special safety procedures including "a guard at times at the entrance to the machinery spaces" and "only a very limited number of people were allowed" in those areas. According to Mr. Lowell, it was "highly, highly unlikely" that Decedent was exposed to asbestos between 1981 and 1984. (CX 10 at 19-21)

As noted, Decedent passed away on August 12, 1998 and Dr. Thomas Keating certified lung cancer as the immediate cause of death. (CX 6) John Shaughnessy ("Decedent") married Ruth A. Stover ("Claimant") on October 1, 1938 (CX 5) and she was living with her husband at the time of his death. There were no minor children at the time of death and funeral expenses exceeded \$3,000.00 (CX 7) Claimant has not remarried. (TR 32)

Dr. Douglas A. Pohl, a pulmonary expert, reviewed Decedent's medical records and diagnostic tests and concluded as follows (EX 15 at 104-10):

Comment

Mr. Shaughnessy was an unfortunate man who, during a routine medical evaluation, was found to have multiple bilateral pulmonary nodules suggesting metastatic disease. A CT scan of the abdomen showed no evidence of a primary tumor. A thoracoscopy was undertaken and a biopsy of the lung demonstrated a primary bronchoalveolar cell carcinoma of the lung with mucinious features. Based upon my review of the pathology slides, I am in complete agreement with this diagnosis.

Bronchoalveolar cell carcinoma is felt to arise from epithelial cells lining the terminal bronchioles. The mucinous variant to this tumor is quite aggressive with frequent bilateral miliary spread within the lung. The clinical presentation often leads to the mistaken impression of a metastatic tumor. Most patients die of their cancers within one year of diagnosis.

Lung cancers, including bronchoalveolar cell carcinoma, are caused by one of a number of well

documented carcinogens. Cigarette smoking is the most common carcinogen that causes lung cancer, reflecting the more than 80 million Americans that smoke cigarettes. Mr. Shaughnessy had been a smoker in the distant past, suggesting that smoking played a role in the development of his lung cancer. However, Mr. Shaughnessy had not smoked in the thirty years prior to discovery of his lung cancer. Many studies have been conducted to determine the effects of cigarette smoking cessation on lung cancer As summarized by the U.S. Surgeon General, the lung cancer risk related to smoking falls continuously after an individual quits smoking. After a period of twenty years, the lung cancer risk closely approaches the Given the fact the (sic) Mr. risk of a non-smoker. Shaughnessy had not smoked for thirty years, it is unlikely his past smoking played a significant role in the development of his lung cancer.

In addition to smoking, a number of occupational carcinogens have been shown to cause lung cancer. One prominent occupational carcinogen is asbestos. The association between asbestos exposure and lung cancer was first described in the 1930's in asbestos workers suffering from asbestosis. Following World War II, Dr. Doll conducted an epidemiologic survey to determine the incidence of lung cancer among asbestos workers. This study was published in 1955 and reported a greater than 17% incidence of lung cancer among the asbestos workers comprising the study group. This lung cancer rate was far higher than the lung cancer rate noted among smokers.

Asbestos related lung cancer is known to be a dose dependent disease with heavier exposures leading to higher lung cancer risk. Mr. Shaughnessy had worked as a carpenter at the Bath Iron Works and was regularly and heavily exposed to asbestos over a period of more than thirty years. Mr. Shaughnessy's pathology slides show the presence of an interstitial fibrosis with associated asbestos bodies diagnostic for pulmonary asbestosis. Asbestosis is a chronic fibrosing disease of the lungs which occurs in response to asbestos fibers that become trapped in the lung parenchyma. Asbestosis typically occurs only after past heavy asbestos exposure. Shaughnessy's pulmonary asbestosis confirms his past asbestosis exposure and indicates that his exposure was Due to the effects of dosein fact quite heavy. response, Mr. Shaughnessy's lung cancer risk was quite high.

In view of Mr. Shaughnessy's long term heavy occupational exposure to asbestos and the well documented cause and effect relationship between asbestos and lung

cancer, it is my opinion, within a reasonable degree of medical certainty, that Mr. Shaughnessy's past exposure to asbestos was the principal cause of his fatal lung cancer.

Dr. John E. Craighead, the Respondents' medical expert, reviewed Decedent's medical records and the doctor concluded as follows (CUX 1):

In conclusion, my examination of the lung tissue reveals pulmonary emphysema of the type associated with cigarette smoking and a bronchoalveolar adenocarcinoma. In the lung tissue I found two asbestos bodies but no evidence of the disease process asbestosis. The presence of the asbestos bodies confirms the exposure to asbestos documented in Mr. Shaughnessy's clinical background. However, the asbestos bodies are only evidence of exposure and not an indication of the disease process asbestosis.

Asbestosis is a specific clinical syndroms in which a specific type of interstitial fibrosis is associated with the deposition of two or more bodies in individual respiratory bronchioles at scattered locations in the lung tissue. The findings in Mr. Shaughnessy's lung do not fit with these criteria.

In my opinion with a high degree of medical probability, the bronchogenic cancer in the lung of Mr. John Shaughnessy was caused by cigarette smoking. Similarly, the emphysematous pulmonary disease was a consequence of exposure of the lungs chronically to cigarette smoke effluents. In my opinion with a high degree of medical probability, asbestos played no causative or contributory role in the development of the disease. It is clear from the pathological findings that Mr. Shaughnessy was exposed to asbestos but there was no evidence of the disease process asbestosis. The medical literature in the past indicates that persons who smoke and are exposed to asbestos experience an increased risk of developing lung cancer, but only when the clinical disease process asbestosis exists.

Although that report was filed late, it is admitted into evidence and Claimant was afforded the opportunity to provide Dr. Pohl's supplemental report. The doctor did so by report dated October 10, 1999 (CX 20) and in that report the doctor reiterated his opinions and strongly disagreed with Dr. Pohl's simplistic conclusory opinion.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459 (1968), reh. denied, 391 U.S. 929 (1969); Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Scott v. Tug Mate, Incorporated, 22 BRBS 164, 165, 167 (1989); Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989); Anderson v. Todd Shipyard Corp., 22 BRBS 20, 22 (1989); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Seaman v. Jacksonville Shipyard, Inc., 14 BRBS 148.9 (1981); Brandt v. Avondale Shipyards, Inc., 8 BRBS 698 (1978); Sargent v. Matson Terminal, Inc., 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. See 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980); Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Anderson v. Todd Shipyards, supra, at 21; Miranda v. Excavation Construction, Inc., 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "prima facie" case. The Supreme Court has held that "[a] prima facie 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc., 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." The presumption, though, is applicable once claimant establishes that he has sustained an injury, i.e., harm to his body. Preziosi v. Controlled Industries, 22 BRBS 468, 470 (1989); Brown v. Pacific Dry Dock Industries, 22 BRBS 284, 285 (1989); Trask v. Lockheed Shipbuilding and Construction Company, 17 BRBS 56, 59 (1985); Kelaita v. Triple A. Machine Shop, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions

existed at work, which could have caused the harm or pain. Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984); Kelaita, supra. this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out To rebut the presumption, the party opposing of employment. entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980); Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966); Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); Kier, supra. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. Brown v. Pacific Dry Dock, 22 BRBS 284 (1989); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1981); Holmes v. Universal Maritime Serv. Corp., 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. Sprague v. Director, OWCP, 688 F.2d 862 (1st Cir. 1982); Holmes, supra; MacDonald v. Trailer Marine Transport Corp., 18 BRBS 259 (1986).

To establish a prima facie case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. See, e.g., Noble Drilling Company v. Drake, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. See Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986); Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. See, e.g., Leone v. Sealand Terminal Corp., 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima** facie case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may

properly rely on Claimant's statements to establish that her husband experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. See, e.g., Sinclair v. United Food and Commercial Workers, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the prepresumption is not sufficient to rebut the presumption. See generally Miffleton v. Briggs Ice Cream Co., 12 BRBS 445 (1980).

The presumption of causation can be rebutted only "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely rules out the connection between the alleged event and the alleged harm. In Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. See also Cairns v. Matson Terminals, Inc., 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. See Phillips v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. But see Brown v. Pacific Dry Dock, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the prima facie elements harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". Holmes v. Universal Maritime Services Corp., 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. Young & Co. v. Shea, 397 F.2d 185, 188 (5th Cir. 1968), cert. denied, 395 U.S. 920, 89 S. Ct. 1771

(1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, see Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. Peterson v. General Dynamics Corp., 25 BRBS 71 (1991), aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), cert. denied, 507 U.S. 909, 113 S. Ct. 1264 (1993); Obert v. John T. Clark and Son of Maryland, 23 BRBS 157 (1990); Sam v. Loffland Brothers Co., 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, see Pietrunti v. Director, OWCP, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to her husband's bodily frame, **i.e.**, his bronchial alveolar carcinoma of the lung, resulted from his exposure to the inhalation of asbestos at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1312 (1982), rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc., 627 F.2d 455

(D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. Gardner v. Bath Iron Works Corporation, 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385 (1st Cir. 1981); Preziosi v. Controlled Industries, 22 BRBS 468 (1989); Janusziewicz v. Sun Shipbuilding and Dry Dock Company, 22 BRBS 376 (1989) (Decision and Order on Remand); Johnson v. Ingalls Shipbuilding, 22 BRBS 160 (1989); Madrid v. Coast Marine Construction, 22 BRBS 148 Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying the entire resultant disability is condition, compensable. (5th Strachan Shipping v. Nash, 782 F.2d 513 Cir. Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989); Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Mijangos, supra; Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and nonwork-related conditions. Lopez v. Southern Stevedores, 23 BRBS 295 (1990); Care v. WMATA, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), cert. denied, 350 U.S. 913 (1955). Thorud v. Brady-Hamilton Stevedore Company, et al., 18 BRBS 232 (1987); Geisler v. Columbia Asbestos, Inc., 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. Bath Iron Works Corp. v. White, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude that Decedent's lung cancer directly resulted from his asbestos exposure at the Employer's shipyard, that the overwhelming majority of the medical evidence here establishes the causal relationship between the lung cancer and the maritime employment, that Dr. Craighead does not render an **unequivocal** statement ruling out any connection between the lung cancer and the maritime employment, (I especially note that Dr. Pohl does not consider the

well accepted medico-scientific concept of the synergistic effect between cigarette smoking, asbestos exposure and the development of lung cancer) that the date of injury is June 17, 1998 based upon the report of Dr. Meyers (CX 16), that timely notice of the Decedent's October 5, 1998 by the Form LS-201 (CX 1) and that the Claimant's claim for Death Benefits was filed on or about October 5, 1998. (CX 2)

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Todd Shipyards Corp. v. Black, 717 F.2d 1280 (9th Cir. 1983); Hoey v. General Dynamics Corporation, 17 BRBS 229 (1985); Pitts v. Bethlehem Steel Corp., 17 BRBS 17 (1985); Yalowchuck v. General Dynamics Corp., 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (i.e., becomes manifest) occurs after claimant has retired. See Woods v. Bethlehem Steel Corp., 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the quidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. See 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent Donnell v. Bath Iron Works Corporation, 22 physical impairment. BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. See 33 U.S.C. §910(c)(2)(B); Taddeo v. Bethlehem Steel Corp., 22 BRBS 52 (1989); Smith v. Ingalls Shipbuilding, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the

relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. MacDonald v. Bethlehem Steel Corp., 18 BRBS 181, 183 and 184 (1986). Compare LaFaille v. General Dynamics Corp., 18 BRBS 882 (1986), rev'd in relevant part sub nom. LaFaille v. Benefits Review Board, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

Claimant is a so-called voluntary retiree under the Act because he took an "early retirement" April 30, 1984, shortly before his sixty-fifth birthday, was in good health at that time and did not begin to experience breathing problems until December of 1997 and as his lung cancer was definitely diagnosed on June 17, 1998. (CX 16)

Accordingly, any benefits awarded herein will be based upon the National Average Weekly Wage as of the date of death on August 12, 1998, or \$422.85.

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. Spence v. Terminal Shipping Co., 7 BRBS 128 (1977), aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), cert. denied, 444 U.S. 963 (1975); Marshall v. Looney's Sheet Metal Shop, 10 BRBS 728 (1978), aff'd sub nom. Travelers Insurance Co. v. Marshall, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. Almeida v. General Dynamics Corp., 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. See Wilson v. Vecco Concrete Construction Co., 16 BRBS 22 (1983); Stark v. Bethlehem Steel Corp., 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding \$3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was \$1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to \$3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. Adams v. Newport News Shipbuilding and Dry Dock Company, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. Dunn v. Equitable Equipment Co., 8 BRBS 18 (1978); Lombardo v. Moore-McCormack Lines, Inc., 6 BRBS 361 (1977); Gray v. Ferrary Marine Repairs, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than \$105 nor less than \$27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's

actual average weekly wage. See Dennis v. Detroit Harbor Terminals, 18 BRBS 250 (1986), aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc., 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); Dunn, supra; Lombardo, supra; Gray, supra.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of \$532 per week, two-thirds of the employee's \$798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on August 12, 1998, the date of her husband's death, based upon the National Average Weekly Wage \$422.85 as of that date, pursuant to Section 6(b), as I find and conclude that Decedent's death resulted from his lung cancer, which condition was first diagnosed and reported by Dr. Solander (CX 16) after Decedent's hospitalization in June of 1998. The Death Certificate certifies as the immediate cause of death, lung cancer. (CX 6) Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 556 (1978), aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP, 594 F. 2d 986 (4th Cir. 1979); Santos v. General Dynamics Corp., 22 BRBS 226 (1989); Adams v. Newport News Shipbuilding, 22 BRBS 78 (1989); Smith v. Ingalls Shipbuilding, 22 BRBS 26, 50 (1989); Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988); Perry v. Carolina Shipping, 20 BRBS 90 (1987); Hoey v. General Dynamics Corp., 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills " Grant v. Portland Stevedoring Company, 16 BRBS 267, 270 (1984), modified on reconsideration, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. Adams v. Newport News Shipbuilding, 22 BRBS 78, 84 (1989).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a workrelated injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. Colburn v. General Dynamics Corp., 21 BRBS 219, 22 (1988); Barbour v. Woodward & Lothrop, Inc., 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. Addison v. Ryan-Walsh Stevedoring Company, 22 BRBS 32, 36 (1989); Mayfield v. Atlantic & Gulf Stevedores, 16 BRBS 228 (1984); Dean v. Marine Terminals Corp., 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. Bulone v. Universal Terminal and Stevedore Corp., 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment work-related injury. Tough v. General Corporation, 22 BRBS 356 (1989); Gilliam v. The Western Union **Telegraph Co.**, 8 BRBS 278 (1978).

In Shahady v. Atlas Tile & Marble, 13 BRBS 1007 (1981), rev'd on other grounds, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. Banks v. Bath Iron Works Corp., 22 BRBS 301, 307, 308 (1989); Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc., 15 BRBS 299 (1983); Beynum v. Washington Metropolitan Area Transit Authority, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the

employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. Atlantic & Gulf Stevedores, Inc. v. Neuman, 440 F.2d 908 (5th Cir. 1971); Matthews v. Jeffboat, Inc., 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. Slattery Associates, Inc. v. Lloyd, 725 F.2d 780 (D.C. Cir. 1984); Walker v. AAF Exchange Service, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. Roger's Terminal and Shipping Corporation v. Director, OWCP, 784 F.2d 687 (5th Cir. 1986); Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989); Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. Betz v. Arthur Snowden Company, 14 BRBS 805 (1981). See also 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. Roger's Terminal, supra.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her husband's work-related injury on or about October 5, 1998 (CX 1) and requested appropriate medical care and treatment. However, the Respondents did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, Respondents are responsible for the medical expenses in the diagnosis, evaluation and palliative treatment of Decedent's lung cancer between May 27, 1998 and his death on August 12, 1998, and representative medical bills are in evidence as CX 19.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted Claimant's entitlement to Death Benefits. (EX 3) Ramos v. Universal Dredging Corporation, 15 BRBS 140, 145 (1982); Garner v. Olin Corp., 11 BRBS 502, 506 (1979).

Responsible Employer

The Employer and Commercial Union Companies ("Respondent") are responsible for payment of benefits under the rule stated in Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo, 350 Under the last employer rule of Cardillo, the U.S. 913 (1955). employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. Cardillo, 225 F.2d at 145. See Cordero v. Triple A. Machine Shop, 580 F.2d 1331 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979); General Dynamics Corporation v. Benefits Review Board, 565 F.2d 208 (2d Claimant is not required to demonstrate that a Cir. 1977). distinct injury or aggravation resulted from this exposure. need only demonstrate exposure to injurious stimuli. Tisdale v. Owens Corning Fiber Glass Co., 13 BRBS 167 (1981), aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor, 698 F.2d 1233 (9th Cir. 1982), cert. denied, 462 U.S. 1106, 103 S.Ct. 2454 (1983); Whitlock v. Lockheed Shipbuilding & Construction Co., 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the Cardillo test is identical to the awareness requirement of Section 12. Larson v. Jones Oregon Stevedoring Co., 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the Cardillo rule. Grace v. Bath Iron Works Corp., 21 BRBS 244 (1988); Lustig v. Todd Shipyards Corp., 20 BRBS 207 (1988); Proffitt v. E.J. Bartells Co., 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies Cardillo). Compare Todd Pacific Shipyards Corporation v. Director, OWCP, 914 F.2d 1317 (9th Cir. 1990), rev'g Picinich v. Lockheed Shipbuilding, 22 BRBS 289 (1989).

Mr. Lowell testified forthrightly and categorically that Decedent was not exposed to asbestos after February 28, 1981 and, as that testimony is uncontradicted, Commercial Union Companies, as the Carrier on the risk, is responsible for the benefits awarded herein. (CX 10)

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent

injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1949); FMC Corporation v. Director, OWCP, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983); Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co., 676 F.2d 110 (4th Cir. 1982); Director, OWCP v. Sun Shipbuilding & Dry Dock Co., 600 F.2d 440 (3rd Cir. 1979); C & P Telephone v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977); Equitable Equipment Co. v. Hardy, 558 F.2d 1192 (5th Cir. 1977); Shaw v. Todd Pacific Shipyards, 23 BRBS 96 (1989); Dugan v. Todd Shipyards, 22 BRBS 42 (1989); McDuffie v. Eller and 10 BRBS 685 (1979); Reed v. Lockheed Shipbuilding & Construction Co., 8 BRBS 399 (1978); Nobles v. Children's Hospital, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be See Director v. Todd Shipyard Corporation, liberally construed. 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. Director, OWCP v. General Dynamics Corp., 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); Kooley v. Marine Industries Northwest, 22 BRBS 142, 147 (1989); Benoit v. General Dynamics Corp., 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-Instead, "the key to the issue is the existing condition. availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." Dillingham Corp. v. Massey, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. Director v. Universal Terminal & Stevedoring Corp., 575 F.2d 452 (3d Cir. 1978); Berkstresser v. Washington Metropolitan Area Transit Authority, 22 BRBS 280 (1989), rev'd and remanded on other grounds sub nom. Director v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990); Reiche v. Tracor Marine, Inc., 16 BRBS 272, 276 (1984); Harris v. Lambert's Point Docks, Inc., 15 BRBS 33 (19982), aff'd, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 Moreover, there must be information available BRBS 206 (1978). which alerts the employer to the existence of a medical condition. Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); Armstrong v. General Dynamics Corp., 22 BRBS 276 (1989); Berkstresser, supra, at 283; Villasenor v. Marine Maintenance Industries, 17 BRBS 99, 103 (1985); Hitt v. Newport News Shipbuilding and Dry Dock Co., 16 BRBS 353 (1984); Musgrove v. William E. Campbell Company, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. v. General Dynamics Corp., 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. Dugan v. Todd Shipyards, 22 BRBS 42 (1989);

Brogden v. Newport News Shipbuilding and Dry Dock Company, 16 BRBS 259 (1984); Falcone, supra.

The pre-existing permanent partial disability need not be economically disabling. **Director**, **OWCP** v. **Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); **Equitable Equipment Company** v. **Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores** v. **Director**, **OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. Topping v. Newport News Shipbuilding, 16 BRBS 40 (1983); Musgrove v. William E. Campbell Co., 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. regard, see Director, OWCP (Bergeron) v. General Dynamics Corp., 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); Luccitelli v. General Dynamics Corp., 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); CNA Insurance Company v. Legrow, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. Director, OWCP v. General Dynamics Corp. (Bergeron), supra.

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. Barclift v. Newport News Shipbuilding & Dry Dock Co., 15 BRBS 418 (1983), rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 737 F.2d 1295 (4th Cir. 1984); Scott v. Rowe Machine Works, 9 BRBS 198 (1978); Spencer v. Bethlehem Steel Corp., 7 BRBS 675 (1978).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In Huneycutt v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 142 (1985), the Board held that where permanent partial

disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in Davenport v. Apex Decorating Co., 18 BRBS 194 (1986), the Board applied Huneycutt to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. See also Hickman v. Universal Maritime Service Corp., 22 BRBS 212 (1989); Adams v. Newport News Shipbuilding and Dry Dock Company, 22 BRBS 78 (1989); Henry v. George Hyman Construction Company, 21 BRBS 329 (1988); Bingham v. General Dynamics Corp., 20 BRBS 198 (1988); Sawyer v. Newport News Shipbuilding and Dry Dock Co., 15 BRBS 270 (1982); Graziano v. General Dynamics Corp., 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); ${\bf Cabe}\ {\bf v.}\ {\bf Newport}\ {\bf News}$ Shipbuilding and Dry Dock Co., 13 BRBS 1029 (1981); Adams, supra.

However, the Board did not apply Huneycutt in Cooper v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). Cooper, supra, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. Director, OWCP v. Newport News Shipbuilding and Dry Dock Co., 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, ipso facto, establish a pre-existing disability for purposes of Section 8(f). American Shipbuilding v. Director, OWCP, 865 F.2d 727, 22 BRBS 15 (CRT) (6th

Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. Sacchetti v. General Dynamics Corp., 14 BRBS 29, 35 (1981); aff'd, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, viz, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. Director, OWCP v. Pepco, 607 F.2d 1378 (D.C. Cir. 1979), aff'g, 6 BRBS 527 (1977); Atlantic & Gulf Stevedores, Inc. v. Director, OWCP, 542 F.2d 602 (3d Cir. 1976); Parent v. Duluth Missabe & Iron Range Railway Co., 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. Sacchetti, supra, at 681 F.2d 37.

On the basis of the totality of the record, I find and conclude that the Employer and its Carriers have not satisfied these requirements because the record reflects that Decedent died as a result of his lung cancer, a fatal disease **per se.** (CX 6)

As Decedent was a voluntary retiree and as benefits are being awarded under Section 8(c)(23) for Decedent's lung cancer (CX 6), only Decedent's prior pulmonary problems can qualify as a pre-existing permanent partial disability, which, together with subsequent exposure to the injurious stimuli, would thereby entitle the Employer to Section 8(f) relief. In this regard, **see Adams v.** Newport News Shipbuilding and Dry Dock Company, 22 BRBS 78, 85 (1989).

In Adams, the Benefits Review Board held at page 85:

"Regarding Section 8(f) relief and the Section 8(c)(23) claim, we hold, as a matter of law, that Decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not preexisting permanent partial disabilities which can entitle Employer to Section 8(f) relief because they cannot contribute to Claimant's disability under Section 8(c)(23). A Section 8(c)(23) award provides compensation for permanent partial disability due to occupational disease that becomes manifest after voluntary See, e.g., MacLeod v. Bethlehem Steel Corp., 20 BRBS retirement. 234, 237 (1988); **see also** 33 U.S.C. §§908(c)(23), 910(d)(2). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. See 33 U.S.C. Section 8(f) relief is only available where $\S908(c)(23)$. claimant's disability is not due to his second injury alone. Section 8(c)(23) case, a pre-existing hearing loss, or back, arthritic or anemic conditions have no role in the award and cannot contribute to a greater degree of disability, since only the impairment due to occupational lung disease is compensated. In the

instant case, therefore, only Decedent's pre-existing COPD could have combined with Decedent's mesothelioma to cause a materially and substantially greater degree of occupational disease-related disability. Accordingly, Decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to Section 8(f) relief and the Section 9 Death Benefits claim, only Decedent's COPD could, as a matter of law, be a pre-existing disability contributing to Decedent's death in this case. evidence of record establishes a contribution from the COPD to Decedent's death, in addition to respiratory failure mesothelioma. See generally Dugas (v. Durwood Dunn, Inc.), supra, 21 BRBS at 279."

In **Adams**, the Board noted, "there is evidence that prior to contracting mesothelioma, Decedent suffered from chronic obstructive pulmonary disease (COPD), hearing loss, lower back difficulties, anemia and arthritis. The Director argues that Employer failed to establish any elements for a Section 8(f) award based on Claimant's pre-existing chronic obstructive pulmonary disease, back condition, arthritis and hearing loss."

However, in this case at bar, Decedent was in "good" health at the time of his voluntary retirement on April 30, 1984, and his breathing problems did not become manifest, and were not diagnosed, until June of 1998 when he began to lose weight, could not sleep, and then finally went to the doctor. (CX 12)

In view of the foregoing, the Respondents are not entitled to Section 8(f) relief on the basis of the Board's holding in **Adams**, supra.

Section 8(f) relief is not available to the Employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom.**, **Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards**, **Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards**, **Inc. v. Director**, **OWCP**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

Moreover, Employer's liability is not limited pursuant to Section 8(f) where Claimant's disability did not result from the combination of coalescence of a prior injury with a present one. Duncanson-Harrelson Company v. Director, OWCP, 644 F.2d 827 (9th Cir. 1981). Moreover, the Employer has the burden of proving that three requirements of the Act have been satisfied. Director, OWCP v. Newport News Shipbuilding and Dry Dock Co., 676 F.2d 110 (4th Cir. 1982).

In the case at bar, the Employer relies upon Decedent's alleged pre-existing emphysema since at least February 9, 1982, in support of its argument that Section 8(f) is applicable herein. Decedent was in good health when he retired voluntarily in 1984, and his mesothelioma was not diagnosed until June of 1998. Lung cancer, a fatal disease, alone caused Decedent's death, and there was no coalescence or combination with any underlying cardiac disease, and, even assuming the existence of such coalescence, Section 8(f) relief is not permissible pursuant to the Board's holding in Adams, supra, a case neither cited nor distinguished by the Employer and its Carriers.

Moreover, while emphysema was seen on Decedent's x-ray on February 9, 1982 (LX 1), this exposure to asbestos dust ended in 1974 or 1975. Thus, there was no continued exposure after that date.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer and Commercial Union ("Respondents"). Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after December 9, 1998, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and Respondents' attorney shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

- 1. The Employer and Commercial Union (Respondents) shall pay Decedent's widow, Ruth S. Shaughnessy, ("Claimant"), Death Benefits from August 12, 1998, based upon the National Average Weekly Wage of \$422.85, in accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.
- 2. The Respondents shall reimburse or pay Claimant reasonable funeral expenses of \$3,000.00, pursuant to Section 9(a) of the Act. (CX 7)
- 3. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due

until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Respondents.

- 4. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, between May 27, 1998 and August 12, 1998, subject to the provisions of Section 7 of the Act.
- 5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on December 9, 1998.

DAVID W. DI NARDI Administrative Law Judge

Dated:
Boston, Massachusetts

DWD:pah:las